

“CATFISHING”: A COMPARATIVE ANALYSIS OF U.S. V. CANADIAN CATFISHING LAWS & THEIR LIMITATIONS

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I. INTRODUCTION

In recent years, the internet has proven to be an “effective tool” in facilitating communication between individuals on a global scale.¹ However, despite its advantages, the internet has also proven to be an “effective tool” for perpetrators who mask themselves behind a computer screen and deceive others through online impersonation for malicious purposes, self-gain, or pastime. This is otherwise known as “catfishing.”

Catfishing is a phenomenon that is increasingly gaining recognition and is more prevalent than ever before.² However, it is a phenomenon that has been around for many years, long before the internet. “People have been lying about their identities in search of notoriety or love or thrills for a long, long time.”³

Due to advancements in technology and the nature of the internet, catfishing is now more prevalent through the form of online impersonation. However, perpetrators have not always turned to computers or technology to carry out their deceiving acts.⁴ In fact, catfishing dates back to 1695.⁵ Perpetrators in search of love would utilize personal ads to lure victims and would then begin to send letters filled with “sob stories about evil landlords” to scam victims out of their money.⁶ In the late nineteenth and early twentieth centuries came the era of “Lonely Hearts Killers,” where personal ads were used to lure victims to secluded places where the victims were then killed for their money.⁷

Then came Albert Fish, a famous catfish in the 1920s, who would write to women as his alter ego (a made-up Hollywood persona named Robert Hayden).⁸ The letters Fish sent would begin with a loving message (probably to lure women into thinking they were reading something of importance), followed by “graphic sadomasochistic fantasies.”⁹ Surprisingly enough, women would still show up at Fish’s doorstep, where he would introduce himself as James W. Pell and would “try to get them to whip him with a

¹ Cassie Cox, *Protecting Victims of Cyberstalking, Cyberharassment, and Online Impersonation Through Prosecutions and Effective Laws*, 54 JURIMETRICS J. 277, 302 (2014).

² Zachary Heck, “*Catfish*” Added to the Sea of Litigation, AM. BAR ASS’N (Jan. 1, 2017), https://www.americanbar.org/groups/young_lawyers/publications/tyl/topics/poplaw/catfish_added_the_sea_litigation/; Stephanie Nolasco, ‘*Catfish*’ Host Nev Schulman: ‘More People are Getting Catfished than Ever Before,’ FOX NEWS (Jan. 3, 2018), <https://www.foxnews.com/entertainment/catfish-host-nev-schulman-more-people-are-getting-catfished-than-ever-before>.

³ Mike Pearl, *How Catfishing Worked Before the Internet*, VICE (Mar. 19, 2015), https://www.vice.com/en_ca/article/5gk78n/how-did-people-catfish-before-the-internet.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

length of wet rope.”¹⁰ When authorities were notified of Fish’s behavior, he was arrested and put on trial.¹¹ Following his trial he was executed by electric chair in 1936.¹²

Today, a catfish is defined as “someone who uses false information to cultivate a persona online that does not represent their true identity . . . [which] commonly involves using stolen or edited photos usually taken from an unwitting third party,” or the creation of a completely fictitious persona.¹³

The term “catfish” became more widely known following a 2010 documentary, *Catfish*, created by Nev Schulman, a victim of a catfishing scheme himself.¹⁴ Schulman created the documentary upon learning that a woman with whom he had developed a nine-month relationship was completely fictitious.¹⁵ The perpetrator of the scam was a married woman who had been utilizing photographs from a model’s account (a third party who had neither given permission for nor was aware of this use of her photographs) to create an entirely fictitious profile and relationship with Schulman.¹⁶ The perpetrator’s husband, an avid fisherman named Vince Pierce, inspired the name of the documentary.¹⁷ When interviewed about his wife’s behavior, Pierce responded with a metaphorical explanation:

They used to tank cod from Alaska all the way to China. They’d keep them in vats in the ship. By the time the codfish reached China, the flesh was mush and tasteless. So this guy came up with the idea that if you put these cods in these big vats, put some catfish in with them and the catfish will keep the cod agile. And there are those people who are catfish in life. And they keep you on your toes. They keep you guessing, they keep you thinking, they keep you fresh.¹⁸

The documentary then led to a popular MTV reality series created in 2012, *Catfish*, hosted by Schulman.¹⁹ The series, which is still ongoing today

¹⁰ *Id.*

¹¹ *Id.*

¹² *Id.*

¹³ Eric Vanman, *It’s Not About Money: We Asked Catfish Why They Trick People Online*, THE CONVERSATION, (Jul. 25, 2018), <https://theconversation.com/its-not-about-money-we-asked-catfish-why-they-trick-people-online-100381>.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ Aisha Harris, *Who Coined the Term “Catfish”?*, BROW BEAT (Jan 18, 2013), <https://slate.com/culture/2013/01/catfish-meaning-and-definition-term-for-online-hoaxes-has-a-surprisingly-long-history.html>.

¹⁸ Harris, *supra* note 17; Molly McHugh, *It’s Catfishing Season! How to Tell Lovers from Liars Online, and More*, DIGITAL TRENDS (August 23, 2013), <https://www.digitaltrends.com/web/its-catfishing-season-how-to-tell-lovers-from-liars-online-and-more/>.

¹⁹ Vanman, *supra* note 13.

demonstrates just how common catfishing is.²⁰ The premise behind the series is to help victims identify the perpetrators who have deceived them online.²¹ In an interview by *Fox News*, Schulman was asked about why catfishing is still so prevalent today and he responded:

I think since we started making the show more and more people are getting “catfished” ...not everybody obviously creates entire personalities online, but more people are using the internet . . . More people spend time meeting friends and making relationships on the internet, the more likely they are to be deceived. So...a lot more people are getting catfished than ever before.²²

Schulman also explained catfishing is “almost becoming less advanced, since the internet has become such a normal part of daily life and people don’t view it with the same kind of suspicion they once did.”²³ Further, because there is a sense of “awkwardness around video chatting people don’t necessarily view hesitance to use it as a red flag [if the perpetrator objects to showing his or her face].”²⁴ In sum, the world of online catfishing feeds off of the increased usage of the internet and lack of suspicion surrounding those who utilize the internet. However, “the burden from harmful online behavior becomes greater to society”²⁵ as we move further away from actual human interaction.

Because of the nature of the internet and the unique factors surrounding catfishing, detection of such a crime is becoming increasingly difficult and legal sanctions are becoming harder to apply.²⁶ This is because of advancements in technology and the anonymous nature of catfishing, which allows cybercriminals to hide their identities and commit internet crimes without easily being detected by the victim being catfished or the individual who is being impersonated.²⁷

Statistics indicate that in 2016, approximately 748 Canadian victims lost more than \$17 million to online dating catfishing scams.²⁸ The FBI’s Internet Crime Complaint Center reported that romance scams in the U.S.

²⁰ *Id.*

²¹ Karen Belz, *Nev Schulman and “Catfish” Co-Host Max Joseph Explained Why Catfishing is More Common Than Ever*, HELLO GIGGLES (Jan. 4, 2018), <https://hellogiggles.com/celebrity/nev-schulman-explained-why-catfishing-is-more-common-than-ever/>.

²² Nolasco, *supra* note 2; Belz, *supra* note 21.

²³ Belz, *supra* note 21.

²⁴ *Id.*

²⁵ Vanman, *supra* note 13.

²⁶ Colleen M. Koch, *To Catch a Catfish: A Statutory Solution for Victims of Online Impersonation*, 88 U. COLO. L. REV. 233, 266 (2017).

²⁷ *Id.* at 266-67.

²⁸ *Catfish Warning: Canadians Lost \$17M to Online Dating Scams Last Year*, THE CAN. PRESS (Feb. 14, 2017), <https://montreal.ctvnews.ca/catfish-warning-canadians-lost-17m-to-online-dating-scams-last-year-1.3284932>.

resulted in the highest amount of financial loss to victims compared to other online crimes, where romance scams accounted for 15,000 of the complaints and the loss reported exceeded \$230 million.²⁹ Not just dating sites display an increase in catfishing, perpetrators also target social media websites like Facebook where 83 million Facebook accounts have been reported fake.³⁰ However, despite these numbers, the laws in the U.S. and Canada are inefficient at criminalizing the conduct of catfishing and the types of harms suffered as a result of such conduct.³¹

In response to the prevailing nature of catfishing today and the absence of laws to address the issue, this Note will make a comparative analysis of the existing anti-catfishing laws in both the U.S. and Canada. Part II provides background information on catfishing. Part III provides an overview of existing laws in the U.S. that address catfishing. Part IV provides an overview of Canadian laws that address catfishing. Part V sheds light on the inadequacies of catfishing laws in the U.S and Canada. Lastly, Part VI puts forth possible suggestions for addressing the issue of catfishing and criminalizing such conduct in both the U.S. and Canada.

II. BACKGROUND

A. Catfishing— what is it?

Catfishing takes two primary forms: (1) obtaining another individual's information without consent to gain access to their online profile or impersonating them by creating a fake profile; or (2) creating an entirely fictitious profile.³²

B. Harms of Catfishing

Catfishing harms both the victim who interacts with the perpetrator and the individual whose photograph is utilized in creating the fake profile.³³ Catfishing can negatively affect a victim's employment, professional or personal relationships, finances, and social life.³⁴ For example, say a

²⁹ *FBI Cautions Public to be Wary of Online Romance Scams*, FBI WASH. (Feb. 7, 2018), <https://www.fbi.gov/contact-us/field-offices/washingtondc/news/press-releases/fbi-cautions-public-to-be-wary-of-online-romance-scams>.

³⁰ Hayley Matthews, *15 Statistics on Catfishing (And Ways to Avoid It)*, DATING ADVISE (Jan. 16, 2018), <https://www.datingadvice.com/online-dating/statistics-on-catfishing#heading1>.

³¹ Cox, *supra* note 1, at 302.

³² Evisa Kambellari, *Online Impersonation: I Have a Right to be Left Alone v. You Can't Mandate How I Use My Privacy Toolbox*, TIMELY TECH: THE U. OF ILL. (Sept. 20, 2017), <http://illinoisjltip.com/timelytech/online-impersonation-i-have-a-right-to-be-left-alone-v-you-cant-mandate-how-i-use-my-privacy-toolbox/>.

³³ Koch, *supra* note 26, at 240.

³⁴ *Id.* at 242.

victim's image and name are being used by a perpetrator for catfishing purposes and the victim is in the process of job interviews or in the hiring stages for a potential job opportunity; if an employer comes across the victim's fictitious online profile (which the employer does not know is fictitious), the employer may refuse to hire the victim due to negative information on the fictitious profile that the employer might have found objectionable.³⁵

In other instances, catfishing has had negative effects for online daters, who have suffered a financial loss as a result of perpetrators with fake profiles on dating websites.³⁶

Statistics show online romantic scams have become increasingly common.³⁷ For example, a 2013 Federal Trade Commission report stated that there were over \$105 million in losses as a result of romance scams,³⁸ and in 2014, the FBI reported that in the last six months of 2014 American victims lost approximately \$82 million due to romance scams.³⁹

In many instances, catfishing can lead to situations of cyberbullying, cyberharassment, and cyberstalking.⁴⁰ In cases involving such cybercrimes, the victims suffered not only emotional harm but sometimes physical harm, such as assault, rape, or real-world stalking.⁴¹ For example, in 2018 Cameron Vaughan, a nineteen-year-old male from Ohio, orchestrated a catfishing scheme that ended in his indictment on “two counts each of rape, sexual battery, extortion, and coercion, and one count of kidnapping.”⁴² In an attempt to lure a young male online, Vaughan posed as a young female.⁴³ Vaughan encouraged the victim to send “compromising images of himself.”⁴⁴ Later, while still posing as the young female, Vaughan told the victim that “her” boyfriend had not only become aware of “her” relationship with the victim, but that the boyfriend was going to expose the victim's compromising images online if the victim did not have sexual intercourse with the boyfriend.⁴⁵ The boyfriend in this catfishing scheme was Vaughan

³⁵ *Id.* at 243.

³⁶ *Id.* at 244.

³⁷ See Sean Allocca, Ed., *Online-Dating Extortion Scams Exposed*, DFI NEWS (Feb. 12, 2015), <http://www.forensicmag.com/articles/2015/02/online-dating-extortion-scams-exposed>; Doug Shadel & David Dudley, 'Are You Real?'—*Inside an Online Dating Scam*, AARP THE MAG. (June/July, 2015), <http://www.aarp.org/money/scams-fraud/info-2015/online-dating-scam.html>.

³⁸ Allocca, Ed., *supra* note 37.

³⁹ Shadel & Dudley, *supra* note 37.

⁴⁰ Koch, *supra* note 26, at 242.

⁴¹ *Id.* at 246-47.

⁴² Jennifer Feehan, *Maumee Man Indicted After 'Catfishing' Scheme*, TOLEDO BLADE (Feb. 6, 2018), <https://www.toledoblade.com/Courts/2018/02/06/Maumee-man-indicted-after-catfishing-scheme.html>.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

himself.⁴⁶ Though this scenario presents a more severe outcome of a catfishing scheme gone bad, it demonstrates the lengths some perpetrators are willing to go to and just how vulnerable a victim may become in a catfishing scam.

Cyberbullying, which is more often linked within the school context, is “the willful and repeated use of cell phones, computers, and other electronic communication devices to harass and threaten others.”⁴⁷ “Impersonating someone else online is a form of cyberbullying . . . [because] [i]t is an intentional act that inflicts emotional harm on another person.”⁴⁸ A recent study in the U.S. surveyed 4,972 middle and high school students between ages twelve and seventeen and reported thirty-seven percent of students experienced cyberbullying in their lifetimes.⁴⁹ The study differentiated between twelve specific types of cyberbullying including the most commonly cited: mean and hurtful comments and rumors spread online—24.9% of the students reported experiencing mean and hurtful comments thirty days prior to the study and 22.2% reported experiencing rumors spread online thirty days prior to the study.⁵⁰

Cyberharassment encompasses “threatening or harassing [through] online or electronic communications ‘dedicated solely to tormenting an individual.’”⁵¹ A 2014 U.S. study by Pew Research Center study found “forty percent of internet users have experienced cyberharassment, with young women enduring particularly severe forms of it.”⁵² These alarming statistics are even more concerning when the result of cyberharassment results in death. Take for instance, Amanda Todd, a fifteen-year-old Canadian teenager, who ended her life due to depression after enduring two years of online extortion and cyberbullying from a sexual predator.⁵³

Cyberstalking, the most sinister, “is the use of electronic or online communications to stalk another and typically encompasses threatening or malicious behavior.”⁵⁴ The U.S. Department of Justice has found that yearly 850,000 adults (mostly women), have been victims of cyberstalking.⁵⁵ For instance, a San Diego woman became a stalking victim due to a catfishing

⁴⁶ *Id.*

⁴⁷ Koch, *supra* note 26, at 239-40.

⁴⁸ Sherri Gordon, *Catfishing and How It Relates to Cyberbullying*, VERY WELL FAMILY, <https://www.verywellfamily.com/what-is-catfishing-460588>.

⁴⁹ Justine W. Patchin, *2019 Cyberbullying Data*, CYBERBULLYING RESEARCH CENTER (Jul. 2019), <https://cyberbullying.org/2019-cyberbullying-data>.

⁵⁰ *Id.*

⁵¹ Koch, *supra* note 26, at 240.

⁵² Marlis Silver Sweeney, *What the Law Can (and Can't) Do About Online Harassment*, ATLANTIC (Nov. 12, 2014), <http://www.theatlantic.com/technology/archive/2014/11/what-the-law-can-and-cant-do-about-online-harassment/382638/>.

⁵³ *Id.*

⁵⁴ Koch, *supra* note 26, at 240.

⁵⁵ Sweeney, *supra* note 52.

perpetrator who utilized her photographs to begin an online relationship with someone else.⁵⁶ In a more serious case, a man in Wyoming pled guilty to conspiracy to commit sexual assault and other felonies after he impersonated his ex-girlfriend by posting an ad on Craigslist requesting a rape scenario, which then led to her brutal rape by a man responding to the ad.⁵⁷

C. Why do Perpetrators Catfish?

Before exploring the issues with catfishing laws, it is important to outline various reasons why perpetrators catfish in the first place. Knowledge of this sheds light on the characteristics of perpetrators, their culpability and state of mind (which is not always one of malicious intent, although still reckless), and the types of perpetrators that are more likely to commit the act of catfishing. Further, raising awareness about the types of perpetrators that exist will caution society to be more suspicious of those they interact with online. There are no set reasons as to why perpetrators catfish as very little research has been conducted to answer this question. However, key findings of a recent psychological research study of twenty-seven self-identifying “catfish” from around the world revealed the following information regarding perpetrators’ reasons for catfishing⁵⁸:

1. *Loneliness*

Forty-one percent of the respondents mentioned loneliness as the reason for their catfishing.⁵⁹ One stated, “I just wanted to be more popular and make friends that could talk to me...”⁶⁰ Others stated contributing factors such as a “lonely childhood and ongoing struggles with social connection.”⁶¹

2. *Dissatisfaction with Physical Appearance*

One-third of the responses displayed a dissatisfaction with their physical appearance.⁶² One respondent expressed, “I had lots of self-esteem problems ... I actually consider myself ugly and unattractive ... [t]he only way I have had relationships has been online and with a false identity.”⁶³ Another

⁵⁶ Koch, *supra* note 26, at 244.

⁵⁷ *Id.* at 248.

⁵⁸ Vanman, *supra* note 13 (though the research study is based on a small sample of self-identifying “catfish,” this study provides a glimpse into the mindset that certain perpetrators possess when committing the act of catfishing).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

stated, “[i]f I try to send my real, unedited pictures to anyone that seems nice, they stop responding to me. It’s a form of escapism, or a way of testing what life would be like if you were the same person but more physically attractive.”⁶⁴

3. *Sexuality and Gender Identity*

Some respondents indicated using false identities allowed them to explore their sexuality or gender identity.⁶⁵ A female respondent confessed, “I was catfishing women because I am attracted to women but have never acted on it . . . I pretend to be a man as I would prefer to be in the male role of a heterosexual relationship than a female in a homosexual relationship.”⁶⁶ A prevailing question in reviewing studies such as this is whether the perpetrators ever feel any remorse or guilt for their deceptive behavior.

The above-mentioned study also revealed the respondents’ feelings towards their catfishing behavior.⁶⁷ Many reported feelings of guilt and self-loathing for their deceptive behavior, one stated, “[i]t’s hard to stop the addiction.”⁶⁸ Surprisingly, one-third of participants expressed a desire to confess their deceptive behavior to their victim and some of those who did, reported they continued relations with their victim after confessing.⁶⁹ Lastly, a quarter of the respondents confessed he/she had begun catfishing due to practicality or other circumstances such as being too young for a website.⁷⁰

This study reveals that it is very easy to become a catfish (when dealing with the types of mental and personal issues as illustrated above) or to fall prey to a catfish.⁷¹ There is no simple solution to the problem of catfishing because it seems that “social catfishing . . . provide[s] an outlet for the expression of many different desires and urges . . . [however] although not yet officially a crime, it is never a victimless act.”⁷²

D. The Victim: Who Succumbs to Catfishing Schemes?

“Victims run the gamut across all races and demographics.”⁷³ Scammers will use “any and all avenues, even going into social media to

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.*

⁷² *Id.*

⁷³ Matt Materson, *BBB Warns Online ‘Catfishing’ Scams on the Rise*, WTTW NEWS (Feb. 13, 2018), <https://news.wttw.com/2018/02/13/bbb-warns-online-catfishing-scams-rise>.

‘spearfish’ a specific person by looking into their interests, hobbies and background with the hope of better gaining their attention and striking up a conversation.”⁷⁴ According to a three-month study by the Better Business Bureau, 50% of victims who fall prey to perpetrators are women and the other 50% are males.⁷⁵ “The common denominator between them, the study found, is that they’re seeking a loving relationship and think they’ve found it.”⁷⁶

Steve Bernas, the president of the Better Business Bureau of Chicago and Northern Illinois, believes there are many victims who do not file complaints of catfishing because of embarrassment or devastation.⁷⁷ Bernas states, “Normally the Better Business Bureau sees 10[%] of consumers come forward when they have a complaint . . . [and 90%] will write it off to experience.”⁷⁸ This is an alarming statistic because instead of reporting perpetrators, victims would rather turn a blind eye as opposed to raising awareness on the dangers of the online world and catfishing.

E. Society’s Contribution to Catfishing

The problem with catfishing is that society has stopped asking questions; building online relationships with others is no longer taboo and it has become so normalized that society is less cautious about meeting others online and entrusting those individuals without taking precautionary measures.⁷⁹ This may also explain legislators’ reluctance to enact a law against catfishing because society’s demand for such a law is not seen as a high priority.

There are also situations where society utilizes catfishing to “monitor” an individual or “teach a lesson.”⁸⁰ Universities, including the University of Michigan and Texas Tech University, have used catfishing in hopes of educating their student athletes of the dangers of social media.⁸¹ Kliff Kingsbury, formerly the head coach for Texas Tech University, stated he and other staff coaches set up fake social media accounts posing as young females to “monitor” their school teams’ athletes.⁸² Kingsbury emphasized that the fake social media accounts were not made with the purpose of catfishing its players because the social media posts were then utilized to demonstrate the

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ Nolasco, *supra* note 2.

⁸⁰ Lauren Reichart Smith et.al., *Follow Me, What’s the Harm? Considerations of Catfishing and Utilizing Fake Online Personas on Social Media*, 27 J. LEGAL ASPECTS SPORT 32, 33 (2017).

⁸¹ *Id.* at 36.

⁸² *Id.* at 33.

potential harms damaging posts can have on its athletes.⁸³ However, this is still a form of catfishing because the coaches are posing as young females and the athletes are being deceived by these fictitious profiles.⁸⁴ This is a good example of a way in which catfishing is not being used in a threatening manner, but with the intent to deceive. If the purpose is to monitor or educate young adults of the dangers of the internet, committing the act of catfishing should not be the way to achieve this. Prevention and education can be achieved through alternative measures—such as criminalizing such conduct—that do not contribute to a phenomenon which harmfully affects society today and so desperately requires legal attention.⁸⁵

Television also contributes to catfishing culture. Take for instance TLC network's *I Catfished My Kid*, a television series in which an expert team assists parents in catfishing their own children “to uncover their secrets and test their decision-making” regarding those they interact with on social media.⁸⁶ Though here parents are consenting to catfishing their own children, this show is counterproductive in its attempt to “educate” the younger generation about the potential harms that exist on the internet by committing the very act many victims of catfishing seek criminal liability for.

Although schools and parents are attempting to utilize the act of catfishing to educate the younger generation, it is both harmful and counterproductive in that it sends the wrong message. You cannot educate or promote prevention by committing the very act that you are trying to promote awareness about. There are other measures of educating and preventing and one of them is criminalizing such conduct in order to deter perpetrators from committing the act while promoting accountability. Therefore, society's contribution to catfishing could also be said to deter legislators from enacting a law that criminalizes the conduct because society itself contributes to the issue, blurring the lines and further enhancing the grey area which legislators have been and will continue to be afraid to address.

Not all catfish are “universally malicious,” however catfishing is a harmful online behavior on the rise and in order to minimize such a harm, a better understanding of the issue is in order.⁸⁷ Specifically, more efficient laws addressing the matter are required in order to safe guard online interactions in a society where catfishing “will likely become a more common side-effect for this generation in particular” (a generation where technology is so advanced and the internet is widely used).⁸⁸

⁸³ *Id.* at 36.

⁸⁴ *Id.* at 39-40.

⁸⁵ *Id.* at 40.

⁸⁶ TGROUP, *I Catfished My Kid* (2017), <https://tgroupproductions.com/i-catfished-my-kids/>.

⁸⁷ Vanman, *supra* note 13.

⁸⁸ *Id.*

III. U.S. ANTI-CATFISHING LAWS

A. Federal Law

Perpetrators committing the act of catfishing can be prosecuted under federal statutes such as the Federal Identity Theft and Assumption Deterrence Act,⁸⁹ the Interstate Communications Act,⁹⁰ the Federal Interstate Stalking Punishment and Prevention Act,⁹¹ and the Computer Fraud and Abuse Act.⁹² However, there is no act specifically tailored to the criminalization of catfishing.

1. *The Federal Identity Theft and Assumption Deterrence Act of 1998*

The Federal Identity Theft and Assumption Deterrence Act of 1998 makes it a federal crime to knowingly possess or use, “without lawful authority, a means of identification of another person with the intent to commit . . . any unlawful activity that constitutes a violation of Federal law or that constitutes a felony under any applicable State or local law.”⁹³ The purpose of the Act was to strengthen criminal laws governing the issue of identity theft.⁹⁴ However, a pitfall of the act is the requirement that economic loss occur to render the Act applicable.⁹⁵ In other words, a victim of catfishing who has not suffered an economic loss is unable to obtain justice through the Federal Identity Theft and Assumption Deterrence Act.

2. *The Interstate Communications Act*

The Interstate Communications Act states: “Whoever transmits in interstate or foreign commerce any communication containing any threat to kidnap any person or any threat to injure the person of another, shall be fined . . . or imprisoned . . . or both.”⁹⁶ To violate this Act, the defendant must communicate an actual threat to the victim.⁹⁷ Not all catfishing cases involve communications of an actual threat. Thus, if no actual threat to the victim

⁸⁹ 18 U.S.C. §1028 (2006).

⁹⁰ 18 U.S.C. § 875 (2012).

⁹¹ 18 U.S.C. § 2261A (2013).

⁹² 18 U.S.C. § 1030 (2012).

⁹³ 18 U.S.C. §1028(a)(7) (2006).

⁹⁴ Maksim Reznik, *Identity Theft on Soc. Networking Sites: Developing Issues of Internet Impersonation*, 29 TOURO L. REV. 455, 473 (2013).

⁹⁵ S. Rep. No. 105-274, at 4 (1998).

⁹⁶ 18 U.S.C. § 875(c) (2012).

⁹⁷ *Id.*

exists, the Interstate Communications Act does not hold a perpetrator liable for their online impersonation.⁹⁸

3. *The Federal Interstate Stalking Punishment and Prevention Act*

The Federal Interstate Stalking Punishment and Prevention Act prohibits an individual who has the “intent to kill, injure, harass, intimidate, or place under surveillance with intent to kill, injure, harass, or intimidate another person” from utilizing “mail, any interactive computer service or electronic communication service or electronic communication system of interstate commerce,”⁹⁹ with the result of placing the individual “in reasonable fear of the death of, or serious bodily injury”¹⁰⁰ or “causes, attempts to cause, or [engages in conduct that] would reasonably [be] expected to cause substantial emotional distress.”¹⁰¹ Like the Interstate Communications Act, the Federal Interstate Stalking Punishment and Prevention Act requires the victim reasonably fear death or bodily harm or that the perpetrator’s conduct reasonably cause substantial emotional distress.¹⁰² Thus, in cases where fear of death or bodily harm does not exist, this Act is inapplicable.

4. *The Computer Fraud and Abuse Act*

Lastly, the Computer Fraud and Abuse Act prohibits knowingly accessing a computer without authorization or in excess of authorization.¹⁰³ This Act requires the perpetrator actually access a computer without authorization or exceed authorized access.¹⁰⁴ Therefore, if unauthorized access of a computer has not taken place this Act cannot be applied to hold a perpetrator criminally liable for online impersonation.

B. State Law

Since the rise of catfishing, only a limited number of states criminalize it through identity theft statutes that can be applied to catfishing cases, and only a few explicitly criminalize online impersonation through a specific statute dedicated to online impersonation as opposed to identity theft alone.¹⁰⁵

⁹⁸ See generally *id.*

⁹⁹ 18 U.S.C. § 2261A (2) (2013).

¹⁰⁰ 18 U.S.C. § 2261A (2)(A) (2013).

¹⁰¹ 18 U.S.C. § 2261A (2)(B) (2013).

¹⁰² 18 U.S.C. § 2261A (2) (2013).

¹⁰³ 18 U.S.C. § 1030 (2012).

¹⁰⁴ *Id.*

¹⁰⁵ Kambellari, *supra* note 32; Koch, *supra* note 26, at 257.

1. *New York*

The New York statute was amended to incorporate internet impersonation in March of 2007.¹⁰⁶ New York's Penal Code criminalizes catfishing through a criminal impersonation statute which distinguishes between two degrees of criminal impersonation.¹⁰⁷ Criminal impersonation in the first degree is considered a felony.¹⁰⁸ Criminal impersonation in the second degree is considered a misdemeanor.¹⁰⁹

Both first and second degree of criminal impersonation include penalties resulting in imprisonment.¹¹⁰ For an online impersonation crime to rise to the level of second degree, the statute states a person is guilty of online impersonation if he "impersonates another by communication by internet website or electronic means with intent to obtain a benefit or injure or defraud another."¹¹¹ Here, a victim is required to prove the element of intent in order for the catfishing to rise to the level of second degree criminal online impersonation.¹¹²

Therefore, though New York sets a good example that all states should follow, by enacting a specific statute that governs the issue of online impersonation, the statute still requires the element of "intent to obtain a benefit or injure or defraud another,"¹¹³ which may be difficult to prove given that not all catfishing cases involve a perpetrator who intends to benefit, injure, or defraud another. As discussed in Section II, there are many reasons why perpetrators catfish such as dissatisfaction with their own physical appearance, feelings of loneliness, or a need to escape, thus, in cases such as this, state laws should still criminalize the act of catfishing.¹¹⁴ However, the element of intent should be substituted by reducing the culpability state of mind to recklessness. Part VI of this Note will further expand on this.

2. *California*

California's statute prohibits "impersonat[ing] another actual person through or on an Internet Web site or by other electronic means for purposes

¹⁰⁶ S. 4053, 2007-2008 Reg. Sess. (N.Y. 2008).

¹⁰⁷ N.Y. PENAL LAW § 190.25-190.26 (2008).

¹⁰⁸ N.Y. PENAL LAW § 190.26 (2008) (this section of the statute targets online impersonation of law enforcement, medical care professionals and dental care professionals).

¹⁰⁹ N.Y. PENAL LAW § 190.25 (2008) (this section of the New York statute targets online impersonation of the general public).

¹¹⁰ N.Y. PENAL LAW § 190.25-190.26 (2008).

¹¹¹ N.Y. PENAL LAW § 190.25(4) (2008).

¹¹² *See generally* N.Y. PENAL LAW § 190.25 (2008).

¹¹³ N.Y. PENAL LAW § 190.25(1) (2008).

¹¹⁴ Vanman, *supra* note 13.

of harming, intimidating, threatening, or defrauding another person.”¹¹⁵ California’s statute is considered one of the “most sophisticated” statutes governing the issue of internet identity theft; its efforts include taking the appropriate legislative steps in preventing and deterring perpetrators from committing such a crime.¹¹⁶ In comparison to other state laws addressing catfishing, California’s statute includes harms that other states do not consider worth punishing, such as intimidation.¹¹⁷ This is a step in the right direction. However, this statute still creates limits for victims who are unable to prove intent to harm, intimidate, threaten, or defraud.

3. *Arizona*

Arizona criminalizes online impersonation through its identity theft statute, which was one of the earliest identity theft statutes enacted in 1996.¹¹⁸ The Arizona statute states a perpetrator is guilty of online identity theft when he or she:

[K]nowingly takes . . . or uses any personal identifying information . . . of another person . . . including a real or fictitious person or entity, without the consent of that other person or entity, with the intent to obtain or use the other person's or entity's identity for any unlawful purpose or to cause loss to a person or entity whether or not the person or entity actually suffers any economic loss as a result of the offense.¹¹⁹

It is important to note that while Arizona’s statute does not explicitly mention “online impersonation,” it is imputed through the statute’s broad language that it can be applied to catfishing cases that meet the statute’s elemental requirements.¹²⁰ Arizona is another example demonstrating how the statute’s required element of intent poses a limitation for a catfishing victim who is unable to prove the perpetrator’s intent. A statute such as Arizona’s increases the potential for ambiguity concerning the issue of online impersonation, thus creating conflicting interpretations for both courts and the general public.¹²¹

¹¹⁵ CAL. PENAL CODE § 528.5 (2011).

¹¹⁶ Reznik, *supra* note 94, at 475.

¹¹⁷ CAL. PENAL CODE § 528.5 (2011) (Cf. New York, Arizona, North Carolina, Mississippi).

¹¹⁸ Reznik, *supra* note 94, at 472.

¹¹⁹ ARIZ. REV. STAT. ANN. § 13 (2008).

¹²⁰ Reznik, *supra* note 94, at 473.

¹²¹ *Id.* at 475.

4. *North Carolina*

North Carolina has an identity theft statute and a cyberbullying statute.¹²² North Carolina's identity theft statute makes it illegal for a person to use another's identifying information "for the purposes of making financial or credit transactions."¹²³ North Carolina's cyberbullying statute makes it illegal to "[b]uild a fake profile or [w]eb site" if "the intent [was] to intimidate or torment a minor."¹²⁴ Because North Carolina's statute governing online impersonation is only concerned with financial loss and the protection of minors, the statute creates limitations for catfishing victims who do not fit within those requirements.¹²⁵

5. *Texas*

The Texas Penal Code states a perpetrator commits online impersonation when he or she, without obtaining another individual's "consent and with the intent to harm, defraud, intimidate, or threaten any person, uses the name or persona of another person to" create a fictitious profile or post messages on a social networking site or other internet web pages.¹²⁶ In comparison to other state statutes, Texas provides a higher degree of protection in that it prohibits situations in which the perpetrator "is not proactively engaging in harmful conduct by faking someone else's identity, but instead causes someone else to mistakenly start communication with a nonconsenting party . . . [attempting to use] the acts of innocent third parties to harass the victim."¹²⁷ However, based on the statute's language, the element of intent is still present which may be difficult to prove in certain instances where the purpose to harm, defraud, intimidate, or threaten cannot be shown.¹²⁸

6. *Mississippi*

Mississippi, on the other hand, narrows the scope of what is required for a credible "online impersonation" claim. It requires an additional element to the creation of a fictitious profile—the fictitious profile must be of an actual person.¹²⁹ An additional element that would make a catfishing claim a credible one is, "if another person would reasonably believe, or did

¹²² N.C. GEN. STAT. ANN. § 14-113.20(a) (2005); N.C. GEN. STAT. ANN. § 14-458.1(a)(1)(a) (2009).

¹²³ N.C. GEN. STAT. ANN. § 14-113.20(a) (2005).

¹²⁴ N.C. GEN. STAT. ANN. § 14-458.1(a)(1)(a) (2009).

¹²⁵ See Reznik, *supra* note 94, at 477.

¹²⁶ TEX. PENAL CODE § 33.07(a)(1)(2) (2011).

¹²⁷ Kambellari, *supra* note 32 (Cf. New York, California, Arizona, North Carolina, Mississippi).

¹²⁸ TEX. PENAL CODE § 33.07(a)(1)(2) (2011).

¹²⁹ Koch, *supra* note 26, at 257-58.

reasonably believe, that the defendant was or is the person who was impersonated.”¹³⁰ Under the Mississippi statute, even if an impersonator creates a fictitious profile with the intent to harass another individual, this act is not criminalized unless the fictitious profile impersonates an actual person, thus creating a limitation for catfishing victims of this state who have been deceived by an entirely fictitious profile.¹³¹

Conclusively, despite certain state efforts to enact criminal statutes aimed at addressing the issue of catfishing, gaps in the drafting of the statutes along with other enforcement difficulties render the statutes ineffective in deterring and effectively punishing the conduct of catfishing.¹³²

C. Other Avenues

Victims of catfishing who are unable to seek relief through a criminal statute do have other avenues of seeking a remedy through a civil cause of action. For instance, tort law addresses a number of online impersonation schemes, but the two types of victims for which a remedy is available are: 1) the individual whose identity was used to create an online persona and suffered reputational harm and 2) the individual who was deceived by the impersonator and as a result suffered some sort of damage.¹³³

Evidently, a civil cause of action involving a catfishing claim requires some sort of harm to exist, reputational or otherwise.¹³⁴ These requirements then set the tone for claims of catfishing that can be brought under privacy tort law such as defamation claims, fraudulent misrepresentation, and intentional infliction of emotional distress claims.¹³⁵ Furthermore, the cost of bringing a civil cause of action can be financially challenging for victims of catfishing, as private litigation can be very costly.¹³⁶

Ultimately, alternative avenues available through civil litigation with respect to catfishing also create barriers for victims that have not necessarily experienced a reputational, physical, or financial harm as a result of the impersonator’s actions. Further, in cases where a remedy does exist for the victim, the costs of litigation is another deterrent limiting and impeding

¹³⁰ MISS. CODE ANN. § 97-45-33(2) (2011).

¹³¹ Koch, *supra* note 26, at 257-58.

¹³² *Id.* at 257.

¹³³ *Id.* at 262.

¹³⁴ *Id.* at 262.

¹³⁵ *Id.* at 262.

¹³⁶ *Id.* at 257, 266 (emphasizing that “as any civil claim currently stands, plaintiffs face a likely risk of judgment-proof defendants from whom recovery will be difficult or impossible, making costly litigation not worth the effort” and “[holding] network providers liable in addition to impersonators” would be a better option in terms of providing remedy).

victims from obtaining the remedy they deserve.¹³⁷ The next section will explore Canada's existing laws that address the issue of catfishing.

IV. CANADIAN ANTI-CATFISHING LAWS

In contrast to the United States, Canada provides lesser legal recourse to victims of catfishing, ultimately allowing perpetrators to run free without any legal ramifications.

A. Canada's Criminal Code

While there is no law expressly forbidding an individual from creating a fictitious profile, it can be considered identity theft under Section 403 of Canada's Criminal Code,¹³⁸ whereby

“Everyone commits an offence who fraudulently personates another person, living or dead,

- (a) with intent to gain advantage for themselves or another person;
- (b) with intent to obtain any property or an interest in any property;
- (c) with intent to cause disadvantage to the person being personated or another person; or
- (d) with intent to avoid arrest or prosecution or to obstruct, pervert or defeat the course of justice.

...[P]ersonating a person includes pretending to be the person or using the person's identity information — whether by itself or in combination with identity information pertaining to any person — as if it pertains to the person using it.

Everyone who commits an offence . . . (a) is guilty of an indictable offence and liable to imprisonment for a term of not more than 10 years; or (b) is guilty of an offence punishable on summary conviction.”¹³⁹

Take for instance, Chris Andersen, an American NBA player for the Denver Nuggets, and Paris Roxanne, an aspiring model, both victims of one of the most extreme cases of catfishing and extortion plots reported.¹⁴⁰ Anderson and Roxanne met on Facebook,¹⁴¹ through which they communicated regularly; the pair even spent a few days together in Denver,

¹³⁷ *Id.* at 257, 266.

¹³⁸ Miriam Yosowich, *Are You Legally Allowed to Create Fake Social Media Profiles?*, FINDLAW CANADA, <https://criminal.findlaw.ca/article/are-you-legally-allowed-to-create-fake-social-media-profiles/>.

¹³⁹ CRIMINAL CODE OF CANADA, R.S.C., 1985, c. C-46, sec. 403(1)-(3) (Can.).

¹⁴⁰ Koch, *supra* note 26, at 235.

¹⁴¹ Facebook is a social networking website.

eventually engaging in consensual sexual intercourse.¹⁴² Shortly after, the pair became distant and the communication between the two ended.¹⁴³ Upon terminating communication, Andersen then received threatening messages from Roxanne's mother, or so he thought, advising him that Roxanne was in fact seventeen years old and demanding money in exchange for silence.¹⁴⁴ Although Roxanne had initially told Andersen she was twenty-one years old, he agreed to send a small amount of money in hopes of avoiding negative publicity.¹⁴⁵ On the other end, Roxanne began receiving messages from who she thought was Anderson, threatening her with harm and requesting degrading sex acts.¹⁴⁶ Roxanne then notified the authorities, resulting in the execution of a search warrant from the Douglas County Sheriff's Office.¹⁴⁷ Andersen had no idea Roxanne had contacted authorities until the day of the execution of the search warrant when he was advised his home would be searched by police officers and the Internet Crimes Against Children Unit.¹⁴⁸

During the investigation, not only was Andersen depicted as a child molester on news reports and social media outlets, his career as an NBA player was also affected when he was released from his basketball team as a result of the accusations he was facing.¹⁴⁹ In a surprising turn of events, upon discovering Roxanne's nude photographs on Andersen's hard drive, investigators also discovered that the conversations between the pair had been "triangulated through a third person," Shelly Lynne Chartier.¹⁵⁰ Chartier, a Canadian woman, had created fictitious Facebook profiles posing as both Andersen and Roxanne, manipulating the pair into believing they were speaking to one another throughout the duration of their relationship.¹⁵¹ Chartier was eventually prosecuted and convicted of several charges in Canada.¹⁵²

In *Chartier*, the Court applied the identity theft section of Canada's Criminal Code.¹⁵³ Though the application of Canadian law was successful in *Chartier*, as the perpetrator received a criminal sentence for her role as an internet impersonator,¹⁵⁴ this case presented a scenario in which the perpetrator's intent and the harm caused squarely fit within what Canada's

¹⁴² Flinder Boyd, *The Birdman's Vengeful Ghost*, NEWSWEEK (May 28, 2014), <https://www.newsweek.com/2014/06/06/birdmans-vengeful-ghost-252517.html>.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

Criminal Code prohibited.¹⁵⁵ Canada's Criminal Code holds impersonators criminally liable only when the perpetrator intentionally and fraudulently impersonates another individual (living or dead) to benefit themselves or another party or intentionally impersonates an individual to cause a disadvantage to his or her victim(s).¹⁵⁶ These elements were not difficult to prove in *Chartier*. However, in a scenario where there is insufficient evidence to prove a perpetrator intentionally and fraudulently impersonated a victim, the perpetrator cannot be charged under Canada's identity theft section of the Criminal Code.

In sum, the element of intent and severe harm are requirements in Canadian law which will continue to pose barriers for catfishing victims and allow perpetrators to escape liability. Unless a new law is enacted specifically addressing catfishing, and unless the narrow scope surrounding the element of intent and harm is broadened, justice will not be served to victims of catfishing in Canada.

B. Other Avenues

Similar to the U.S., Canada also provides civil remedies for catfishing victims, however, there are limitations on the type of claims that can be brought.¹⁵⁷ The element of intent and severe harm are still requirements of civil causes of action, leaving victims who cannot prove either element in a remediless situation with the perpetrator at large.¹⁵⁸

For instance, in a claim for intentional infliction of mental suffering the victim "must prove there was a) flagrant or outrageous conduct, b) that conduct was intended to produce harm (reckless indifference is not enough), and c) that conduct resulted in a visible and provable medical illness."¹⁵⁹ In other words, the victim must prove there was some sort of deception intended to inflict harm that resulted in medical harm much more than stress and anguish.¹⁶⁰ "Emotional stress, mental anguish and despair are not generally accepted as amounting to 'visible and provable illness' for purposes of [this] tort."¹⁶¹ Such requirements create more stringent standards, thus leaving victims who cannot prove intent or the type of harm required in a position where they are provided with no remedy for the grief caused by the perpetrator.¹⁶²

¹⁵⁵ See CRIMINAL CODE OF CANADA, R.S.C., 1985, c. C-46, sec. 403(1)-(3) (Can.).

¹⁵⁶ *Id.*

¹⁵⁷ Gil Zvulony, *Is Catfishing Illegal?*, ZVULONY & CO. (2013), <https://zvulony.ca/2013/articles/internet-law/is-catfishing-illegal/>; Yosowich, *supra* note 138.

¹⁵⁸ Zvulony, *Is Catfishing Illegal?*, ZVULONY & CO. (2013).

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

Conclusively, the element of intent and severe harm are requirements in both Canadian criminal and civil causes of action which will continue to pose barriers for catfishing victims and allow perpetrators to escape liability. Unless a new law specifically addressing catfishing is enacted, and unless the narrow scope surrounding the element of intent and harm is broadened, justice will not be served to victims of catfishing in Canada.

V. THE INADEQUACIES OF CURRENT ANTI-CATFISHING LAWS IN THE U.S. AND CANADA

It is apparent that catfishing laws in both the U.S. and Canada pose barriers for victims in proving certain elements required for credible catfishing claims. This section will outline the inadequacies and challenges with laws currently in place, including issues related to proving intent, freedom of speech challenges, and the lack of specific anti-catfishing laws—all factors, both in the U.S. and Canada, that pose limitations for victims of catfishing and allow perpetrators to escape liability.

A. Proving Intent

Mens rea, the guilty mind or intent, is required in proving culpability of all crimes.¹⁶³ The concept of *mens rea* has become “deeply entrenched in American law. . . . [T]he contention that an injury can amount to a crime only when inflicted [with the appropriate *mens rea*] is . . . universal and persistent in mature systems of law Today, *mens rea* is ‘the criminal law’s mantra.’”¹⁶⁴

Utilitarian arguments behind the *mens rea* requirement include the notion of deterrence, that in order to deter individuals from committing a crime they need to “appreciate that punishment lies in store,” otherwise it would be ineffective to punish an individual who lacks a culpable state of mind.¹⁶⁵ Another argument relies on the notion that if one accidentally harms instead of intentionally or with an “evil meaning mind,” then the individual is “harmless and not in need of reformation.”¹⁶⁶ However, these notions are not entirely correct because even if an individual acts without a culpable state of mind, punishing the individual would be effective and useful in warning society of the repercussions associated with committing a certain act.¹⁶⁷ Further, punishment is a “rational way to protect society from [criminals]. . . . At minimum, their punishment may influence them to change their lifestyle

¹⁶³ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW, 117, (LexisNexis, 5th ed. 2009).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

and to avoid [acts] that may [harm others].”¹⁶⁸ The same could be said in criminalizing the act of catfishing and in punishing perpetrators who commit the act of catfishing. In this case, the current laws in both Canada and the U.S. require an element of intent that is difficult to meet; however, criminalizing catfishing would still be effective even if the element of intent were lowered to recklessness.

Intent is an element that is required by both the U.S. and Canadian legal systems with respect to catfishing.¹⁶⁹ This is the first challenge prosecutors face because the element of intent requires a victim to prove the perpetrator intended to specifically harm the victim through the act of catfishing.¹⁷⁰ Along with meeting all of the elements of *actus reus*, a defendant must possess a guilty mind (*mens rea*) at the same time they commit the *actus reus*.¹⁷¹ For the vast majority of criminal offenses, *mens rea* will be satisfied if the defendant can be shown to have purpose (intent), knowledge, negligence, or recklessness.¹⁷²

A defendant is found to have acted with purpose when he acts “purposely with respect to a result if his conscious objective [was] to cause such a result.”¹⁷³ To be found guilty of committing an act knowingly, the defendant must have acted “knowingly with respect to a result if it [was] not his conscious objective, yet he [was] practically certain that his conduct will cause that result.”¹⁷⁴ A defendant acts negligently if he “fails to appreciate the risk that his conduct will cause a specific result . . . only if that failure ‘involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.’”¹⁷⁵ Lastly, a defendant is considered to have acted recklessly if he “consciously disregards a substantial and unjustifiable risk that the material element . . . will result from his conduct.”¹⁷⁶

In catfishing cases, due to the nature of the internet and technology, the element of intent is very difficult to meet because specific intent and purpose to carry out the act against a specific victim is required.¹⁷⁷ However, if the perpetrator masks themselves behind a computer screen, specific intent

¹⁶⁸ *Id.*

¹⁶⁹ Cox, *supra* note 1, at 286-87; Zvulony, *supra* note 157.

¹⁷⁰ Cox, *supra* note 1, at 286-87.

¹⁷¹ DRESSLER, *supra* note 163, at 117.

¹⁷² Paul H. Robinson & Jane A. Grail, *Element Analysis in Defining Crim. Liability: The Model Penal Code and Beyond*, STAN. L. REV. 681, 692-93 (1983).

¹⁷³ *Id.* at 694.

¹⁷⁴ *Id.* at 694.

¹⁷⁵ *Id.* at 695.

¹⁷⁶ *Id.* at 697.

¹⁷⁷ Thaddeus Hoffmeister, *The Challenges of Preventing and Prosecuting Soc. Media Crimes*, 35 PACE L. REV. 115, 128 (2014); *United States v. Infante*, 782 F.Supp.2d 815, 819 (D. Ariz. 2010).

becomes a difficult element to prove.¹⁷⁸ As analyzed above, the element of intent in current online impersonation laws in both the U.S. and Canada are followed by requirements of physical harm or economic loss, however, this is not the case in all catfishing cases.¹⁷⁹ As a result, catfishing victims who have not suffered a physical or economic loss are unable to hold the perpetrator criminally liable due to the limitations posed by stringent elemental requirements.¹⁸⁰ This allows perpetrators to escape liability even though their behavior causes substantial harm to a victim.¹⁸¹

Therefore, to address the stringent requirements of current anti-catfishing laws, the solution would be to lower the culpable mental state to that of recklessness.¹⁸² Enacting new anti-catfishing laws and amending those currently in place to include recklessness as a culpability state of mind would create efficiency in the prosecution of perpetrators, even in cases where no physical harm or economic loss was experienced by the victim. Further, not only would such a change create efficiency in the legal sense, it would also send a message to perpetrators all across the United States and Canada—that catfishing is not a harmless and victimless crime, thus it is deserving of punishment.

B. Freedom of Speech Challenges

Due to the nature of the internet, there is a considerable amount of debate surrounding the right to free speech, which although not absolute, still raises an ethical debate regarding which forms of speech should be protected versus those that should be restricted.¹⁸³ The following sections below will discuss the current categories of unprotected speech in both the U.S. and Canada.

1. First Amendment

There are currently three major categories of unprotected speech under the First Amendment: incitement and fighting words, libelous or otherwise tortious, and obscenity.¹⁸⁴

¹⁷⁸ Hoffmeister, *supra* note 177, at 128; *United States v. Infante*, 782 F.Supp.2d 815, 819 (D. Ariz. 2010).

¹⁷⁹ Hoffmeister, *supra* note 177, at 128.

¹⁸⁰ *Id.*

¹⁸¹ Cox, *supra* note 1, at 288.

¹⁸² *Id.*

¹⁸³ Patricia R. Recupero, *New Technologies, New Problems, New Laws*, THE J. OF THE AM. ACAD. OF PSYCHIATRY AND THE LAW 322, 323 (Sept. 2016).

¹⁸⁴ Ellen Luu, *Web-Assisted Suicide and The First Am.*, 36 HASTINGS CONST. L.Q. 307, 312-16 (2009); Kathleen Ann Ruane, *Freedom of Speech and Press: Exceptions to the First Amendment*, CONGR. RES. SERV. 1, 1 (Sep. 8, 2014), <https://fas.org/sqp/crs/misc/95-815.pdf>; ARTHUR D. HELLMAN,

In assessing whether speech is considered incitement courts apply the *Brandenberg* test which originated from *Brandenberg v. Ohio*.¹⁸⁵ Under the *Brandenberg* test, speech not protected by the First Amendment is that which is “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”¹⁸⁶ However, speech is not prohibited merely because “it increases the chance an unlawful act will be committed at some indefinite future time.”¹⁸⁷

Fighting words fall within the unprotected category of incitement.¹⁸⁸ The Supreme Court in *Chaplinsky v. New Hampshire* provides the rule regarding fighting words.¹⁸⁹ *Chaplinsky* states the use of words “which by their very utterance inflict injury or tend to incite an immediate breach of peace” are considered unprotected speech.¹⁹⁰

In assessing whether speech is unprotected because it is a true threat, the speech requires “the threat of an immediate breach of peace and order.”¹⁹¹ The Court in *Watts v. United States*, states true threats are “serious expression[s] of an intent to commit an act of unlawful violence to a particular individual or group of individuals . . . [t]he speaker need not actually intend to carry out the threat.”¹⁹²

Lastly, in assessing whether speech is unprotected due to obscenity, the Supreme Court created the *Miller* test which asks:

- (a) whether the “average person applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.¹⁹³

The First Amendment limits the ability to bring catfishing cases in the U.S. because catfishing behaviors “often inhabit the ‘gray area’ between fraud and First Amendment–protected speech akin to practical jokes.”¹⁹⁴ In other words, perpetrators of catfishing could argue that creating a fictitious

WILLIAM D. ARAIZA, THOMAS E. BAKER, ASHUTOSH A. BHAGWAT, *FIRST AMENDMENT LAW* 67 (Carolina Acad. Press, LLC 4th ed.2018).

¹⁸⁵ Luu, *supra* note 184.

¹⁸⁶ *Brandenburg v. Ohio*, 395 U.S. 444, 444-45, 447 (1969).

¹⁸⁷ *Id.*

¹⁸⁸ *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942).

¹⁸⁹ *Id.*

¹⁹⁰ *Id.* at 572.

¹⁹¹ Ruane, *Freedom of Speech and Press: Exceptions to The First Am.*, CONGR. RES. SERV. 1, 4 (Sep. 8, 2014).

¹⁹² *Virginia v. Black*, 538 U.S. 343, 359-60 (2003).

¹⁹³ Ruane, *supra* note 184.

¹⁹⁴ Recupero, *supra* note 183, at 324.

profile, persona, or impersonating a victim, was meant to be a joke or form of creativity and therefore their freedom of speech should not be infringed upon.

A common trend among the unprotected categories of speech is the standardized tests that are applied by courts when faced with questions about what is considered an unprotected category as per First Amendment standards. Two primary issues arise: First, there is no modern First Amendment standard that has been created to address the issue of internet speech¹⁹⁵ or catfishing in particular. Second, there is no guidance from the Supreme Court regarding how to apply traditional First Amendment, standardized tests to the issue of internet speech (or catfishing).¹⁹⁶ As a result, jurisdictions are often split on what type of internet speech is considered a protected or unprotected category under the First Amendment or they avoid the issue altogether.¹⁹⁷ Therefore, it is up to the legislature to find a solution to this uncertainty. Enacting a law that is clearer on the types of catfishing acts and harms that are punishable would assist courts in making more guided and concrete decisions.

2. *Canadian Charter of Rights and Freedoms*

The Canadian Charter of Rights and Freedoms “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”¹⁹⁸ Section 2(b) of the Canadian Charter of Rights and Freedoms lists the fundamental freedoms, including “freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.”¹⁹⁹ In a case where infringement of a Charter right occurs, Canadian courts must determine whether the government or other institution’s violation is justified by applying a balancing test to weigh “the objectives and actions of the government or other institution against the interests of an individual claiming that a Charter right has been violated.”²⁰⁰ Restrictions on freedom of expression in Canada include restrictions on perjury, counseling suicide, creation of child pornography, defamation, and

¹⁹⁵ Fernando L. Diaz, *Trolling & The First Am.: Protecting Internet Speech in the Era of Cyberbullies and Internet*, J.L. TECH. & POL’Y 135, 147 (2016).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 149.

¹⁹⁸ Canadian Charter of Rights and Freedoms, Part I Section 1 of Constitution Act, 1982, being Schedule B to the Canada Act 1982, c 11 (U.K.).

¹⁹⁹ Canadian Charter of Rights and Freedoms, Part I Section 2(b) of Constitution Act, 1982, being Schedule B to the Canada Act 1982, c 11 (U.K.).

²⁰⁰ Julian Walker, *Hate Speech and Freedom of Expression: Legal Boundaries in Can.*, LIBR. OF PARLIAMENT (2018), https://lop.parl.ca/sites/PublicWebsite/default/en_CA/ResearchPublications/201825E.

hate speech.²⁰¹ These are all forms of expression that have been limited by the Canadian federal Criminal Code as criminal offences or provincial human rights laws prohibitions.²⁰²

However, although there are protected categories of speech in Canada, Part I, Section 1 of the *Canadian Charter of Rights and Freedoms* arguably provides a limitation on the guarantee of rights and freedoms stating they are guaranteed “only to such reasonable limits.”²⁰³ This Section of the *Canadian Charter of Rights and Freedoms* arguably provides the Canadian government with flexibility in passing laws that address the issue catfishing. Therefore, enacting an anti-catfishing law in Canada that efficiently targets all types of catfishing and harms would then set a limit on the kinds of acts that would be considered reasonable under the *Canadian Charter of Rights and Freedoms*.

3. *How Courts Have Dealt with Freedom of Speech Issues in Catfishing Cases*

In the U.S., the issue of freedom of speech was raised in *State of Minnesota v. Melchert-Dinkel*, a Minnesota Supreme Court case, whereby the defendant and former nurse, Melchert-Dinkel, posed as a young suicidal female nurse and communicated with “suicidal persons” on suicide chat forums resulting in two deaths.²⁰⁴ Melchert-Dinkel not only sought out depressed individuals, he also “feigned caring and understanding to win the trust of the victims while encouraging each to hang themselves, falsely claiming that he would also commit suicide, and attempting to persuade them to let him watch the hangings via webcam.”²⁰⁵ At trial, Melchert-Dinkel raised the First Amendment challenge arguing that encouraging others to commit suicide was a form of protected speech and “nothing he said actually caused the deaths of the individuals in question—they were already suicidal.”²⁰⁶ However, the court rejected the challenge and he was “charged and convicted on two counts of violating a Minnesota statute that made it a crime to advise, encourage, or assist another in completing suicide.”²⁰⁷ On appeal, the state Supreme Court upheld the statute’s prohibition on “assisting in suicide” but struck down its prohibition on “advising and encouraging

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ Canadian Charter of Rights and Freedoms, Part I Section 1 of Constitution Act, 1982, being Schedule B to the Canada Act 1982, c 11 (U.K.).

²⁰⁴ *State v. Melchert-Dinkel*, 844 N.W.2d 13, 16 (Minn. 2014).

²⁰⁵ *Id.*

²⁰⁶ Recupero, *supra* note 183, at 323; Venkat Balasubramani, *Online Kevorkian’s First Am. Challenge to Assisted Suicide Convictions Unsuccessful—State v. Melchert-Dinkel*, TECH. & MARKETING L. BLOG, (Jul. 31, 2012), https://blog.ericgoldman.org/archives/2012/07/online_kevorkia.htm.

²⁰⁷ Recupero, *supra* note 183, at 323.

suicide” as unconstitutional under the First Amendment.²⁰⁸ It therefore upheld that part of his conviction based on “assisting in suicide,” but reversed and remanded that part of his conviction based on the “advising and encouraging” part of the statute.²⁰⁹

Melchert-Dinkel is a prime example of how protected speech challenges may pose issues in cases involving catfishing, even where a death occurs as a result of the conduct. As a result, legislators may be even more reluctant to enact laws against catfishing because a shortcoming of such a law may result in an influx of freedom of speech challenges. However, just as victims of catfishing have suffered for years as a result of an absence in legal recourse, it is the job of legislators and the courts to provide justice that is well deserved to those victims. Freedom of speech challenges in response to catfishing claims can be sorted out in a specific anti-catfishing law, which outlines the types of communication and conduct criminalized. Courts will then be able to create a modern standardized test that addresses the issue of internet speech, or even catfishing in particular.

As mentioned earlier, Canada was faced with the issue of catfishing in the famous *Chartier* case.²¹⁰ However, it was easier to prosecute Chartier because there was sufficient evidence to prove she violated Canada’s Criminal Code.²¹¹ A freedom of speech challenge was not raised in *Chartier*, but if it was, it is more than likely the Court would not have allowed the challenge to stand given that Chartier violated each element required in the statute she was charged with. However, it is important to keep in mind that if a Canadian court were faced with a catfishing case that does not meet the elemental requirements of Canada’s identity theft statute, it will not know how to deal with a freedom of speech challenge should one arise.

Therefore, the guidance to dealing with freedom of speech challenges in the U.S. and Canadian courts will begin through the enactment of a specific anti-catfishing law which can then be enforced through the judicial system.

C. Lack of Specific Anti-Catfishing Laws Addressing the Issue

United States v. Drew is a landmark case demonstrating the negative effects the absence of anti-catfishing laws have and will continue to have on society.²¹²

Lori Drew, the defendant, along with other conspirators created a fake profile on a social media website, Myspace.com, under the name of Josh Evans, where they proceeded to contact and engage in flirtatious

²⁰⁸ State v. Melchert-Dinkel, 844 N.W.2d 13, 25 (Minn. 2014).

²⁰⁹ *Id.*

²¹⁰ Boyd, *supra* note 142.

²¹¹ *Id.*

²¹² Kambellari, *supra* note 32.

conversations with Megan Meier (the victim).²¹³ After a couple of weeks, the conspirators decided to tell Meier that Evans no longer liked her and that “the world would be a better place without her in it.”²¹⁴ Shortly after receiving this communication, Meier committed suicide.²¹⁵

The state of Missouri declined to prosecute Drew because no Missouri criminal harassment statute covered her specific conduct at the time; as a result, the federal government took up the case.²¹⁶ However, the federal prosecution in *Drew* faced many challenges in identifying the offense Drew should be charged with because there was no federal criminal statute against the type of cybercrime committed (online impersonation and cyberbullying).²¹⁷ Ultimately, the prosecution decided to bring a claim under the Computer Fraud and Abuse Act, which prohibited “accessing a computer without authorization or in excess of authorization,” on the grounds that Drew violated the felony portion of the act in violating MySpace’s click-to-agree contract, thus committing the same crime as a hacker.²¹⁸ However, the United States District Court of California reasoned, “creating a MySpace account under a false name, even with tortious intent, cannot be criminalized,” and a violation of MySpaces’ terms of service was at most a contract violation, which Congress had no intention of criminalizing under the act.²¹⁹

Drew demonstrates the type of issues and injustice that foreseeably will arise in the absence of a specific law that prohibits a harmful conduct, in this case catfishing combined with cyberbullying. Had there been a specific catfishing law present, the prosecutors would have been able to charge Drew under that specific law rather than trying to utilize an act that they hoped the court would deem applicable. This case is one legislators should learn from. Legislators should work to enact a law that will provide justice for individuals such as Meier and her parents, who are now left to mourn her death knowing Drew escaped liability for her actions. Although holding Drew liable for Meier’s death in no way restores the damage done, holding Drew accountable for her harmful conduct under a specific law criminalizing such conduct would promote deterrence and demonstrate to perpetrators that such conduct is deserving of punishment. However, until such a law exists, perpetrators like Drew will continue to escape liability at the expense of their victims.

²¹³ United States v. Drew, 259 F.R.D. 449, 452 (C.D. Cal. 2009).

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ Hoffmeister, *supra* note 177, at 132.

²¹⁷ *Id.*

²¹⁸ *See Drew*, 259 F.R.D. at 452.

²¹⁹ *Id.* at 467.

The next section will propose suggestions in criminalizing catfishing in both the U.S. and Canada to help alleviate the current inadequacies and limitations victims of catfishing face as a result of inefficient laws or lack thereof. It will also provide a model of an Anti-Catfishing Uniform Act which removes the limitations that victims currently face with inefficient laws.

VI. PROPOSAL

Considering that current Canadian and U.S. laws do not explicitly or efficiently criminalize catfishing, a Uniform Act would address the issue.

An Anti-Catfishing Uniform Act in the U.S. and Canada would make sure the law applies across the board in all states and provinces. This will automatically address the issue of the absence of anti-catfishing laws. Current Canadian and U.S. (federal and state) laws limit a victim's ability in obtaining relief by imposing stringent elemental requirements such as having to prove intent to benefit, intent to threaten or injure, etc. However, the nature of catfishing and the internet as a whole, proving intent, and First Amendment (U.S) or Canadian Charter of Rights and Freedom (Canada) challenges creates barriers in enacting efficient anti-catfishing laws that protect the rights of all victims as well as perpetrators. Below are suggestions as to how these limitations may be handled should an Anti-Catfishing Uniform Act be enacted in both the U.S. and Canada.

A. Addressing the Limitations Posed by Current Inefficient Anti-Catfishing Laws in the U.S. and Canada

Upon analyzing the criminal statutes in both the U.S. and Canada, neither does it better than the other. Not all states in the U.S. criminalize catfishing, and those that have online impersonation laws create more limitations for victims who cannot meet the elemental requirements of those state laws.²²⁰ On the other hand, Canada does not have a specific anti-catfishing law; instead it utilizes its identity theft statute when the crime fits the elemental requirements.²²¹ This sends the wrong message to perpetrators, who will continue committing the act of catfishing since there is no law explicitly prohibiting such behavior.

²²⁰ See generally, N.Y. PENAL LAW § 190.25 (2008); CAL. PENAL CODE § 528.5 (2011); ARIZ. REV. STAT. ANN. § 13 (2008); N.C. GEN. STAT. ANN. § 14-113.20 (2005); MISS. CODE ANN. § 97-45-33 (2011).

²²¹ See CRIMINAL CODE OF CANADA, R.S.C., 1985, c. C-46, sec. 403(1)-(3) (Can.).

1. *Addressing the Element of Intent*

A common theme among U.S. statutes addressing “online impersonation,” as well as the Canadian Criminal Code, is the element of intent.²²² This means the victim is required to prove that the perpetrator intentionally caused the social harm because it was “his desire (i.e., his conscious object) to cause the social harm; or (2) [the perpetrator acted] with knowledge that the social harm is virtually certain to occur as a result of his conduct.”²²³ Further, the requirement that the perpetrator “knowingly” impersonate another individual adds to the element of intent because the requirement that the act be done with knowledge to cause a particular result is “commonly said to have ‘intended’ the harmful result or conduct.”²²⁴ Lastly, the requirement that the perpetrator “willfully” impersonate another individual also adds to the element of intent, as the term “willful” may “connote an intentional violation of a known legal duty . . . or a purpose to disobey the law.”²²⁵ Evidently, the language used in both U.S. and Canadian laws combatting online impersonation pose a high standard for the victim to prove, especially in a case where an actual physical harm or financial harm is not present.

Therefore, this element of intent should not be held to such a high standard. Lowering the culpability state to recklessness would reduce the limitations posed by the intent requirement in current anti-catfishing laws.

2. *Addressing Freedom of Speech Challenges*

Both U.S. and Canadian law provide freedom of speech protections that pose a conflict for those who hold the belief that creating a completely fictitious profile or impersonating another individual online is a form of expression which one is entitled to. However, if legislatures are not willing to set boundaries or create a law to prohibit an act that has impacted and continues to impact so many victims worldwide, including causing death (i.e. *State of Minnesota v. Melchert-Dinkel*), then perpetrators who catfish will continue to use freedom of speech as their green card to continue committing what should be a crime.

First Amendment and/or Canadian Charter of Rights and Freedom challenges regarding protected speech should be analyzed on a case-by-case basis. Given the debate surrounding what is considered protected speech in

²²² See generally, N.Y. PENAL LAW § 190.25 (2008); CAL. PENAL CODE § 528.5 (2011); ARIZ. REV. STAT. ANN. § 13 (2008); N.C. GEN. STAT. ANN. § 14-113.20 (2005); MISS. CODE ANN. § 97-45-33 (2011); CRIMINAL CODE OF CANADA, R.S.C., 1985, c. C-46, sec. 403(1)-(3) (Can.).

²²³ DRESSLER, *supra* note 163, at 121.

²²⁴ *Id.* at 127.

²²⁵ *Id.* at 130.

both Canada and the U.S., the Uniform Act would outline the specific types of catfishing, the different types of harms, and punishments based on the severity of the conduct (including what resulted from the harm and the duration). In having these guidelines explicitly stated in a law criminalizing the conduct of catfishing, courts will have a better understanding of what would be considered criminal and thus be able to form a basis in deciding whether the defendants protected speech challenge frustrates the intended purpose of the U.S. Constitution's First Amendment or the Canadian Charter of Rights and Freedoms.

VII. CONCLUSION

Due to the nature of the internet and the increasing numbers of catfish who prey on innocent victims online, both the U.S. and Canada need to enact specific anti-catfishing laws criminalizing such conduct. This Note suggests that a Uniform Act would be the best way to approach the problem. The current laws utilized to address cases of catfishing are inefficient and create more limitations rather than remedy the problem. This not only sets a poor example as it allows perpetrators to escape liability, it also encourages perpetrators to keep committing such acts. This could open doors to more harmful crimes. For example, perpetrators who began simply deceiving others by creating fake online profiles will graduate into scamming individuals of their money or, even worse, causing physical harm. Thus, the main purpose of creating a Uniform Act is not only to promote accountability, but to send a message—catfishing is not a victimless crime. Regardless of whether there is a physical or financial harm, impersonating another individual or creating a fake persona to deceive another is harmful in and of itself and should be criminalized. If the U.S. and Canada continue on the same path, justice will continue to be a stranger to victims of catfishing and perpetrators will continue to take advantage of the inefficient legal systems that exist today.